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Cases, Regulations, and Statutes

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The Ninth Circuit Court of Appeals, the same court that decided the appeal in *Catalano v. Commissioner*[9] held in 1995 that, in the event of abandonment in bankruptcy,[10] the "deflection" theory applies and the taxpayer is liable for any gain on the property when the creditor takes action to acquire the property subsequent to abandonment.[11] The Eighth Circuit Court of Appeals agrees with that characterization although that treatment has been rejected by a U.S. Bankruptcy Court in Massachusetts[12] and criticized by this author.[13]

Even worse, the Internal Revenue Service, in 1989, ruled that abandonment in bankruptcy effectively converts a recourse obligation into a non-recourse obligation (which was already the case in *Catalano v. Commissioner*)[14] with the result that the entire difference between the income tax basis of the property and the amount of the debt was gain to the taxpayer.[15] The personal liability of the taxpayer was discharged in bankruptcy. There is no discharge of indebtedness income for non-recourse obligations by the IRS view of the taxation of abandoned property. Discharge of indebtedness for a taxpayer in bankruptcy[16] is not subject to income tax (although the taxpayer's tax attributes and basis of property must be reduced).[17] Similarly, for insolvent taxpayers not in bankruptcy, there is no income tax liability for discharge of indebtedness income to the extent of the taxpayer's insolvency.[18] Even if a farm or ranch taxpayer is solvent, income tax liability may be avoided under the solvent farm debtor rule[19] although tax attributes and the basis of property must be reduced.[20]

None of the rules apply to non-recourse indebtedness inasmuch as the entire difference between basis of the property and debt is gain and there is no discharge of indebtedness income.

In conclusion

Abandonment of property in bankruptcy is a treacherous concept from an income tax perspective. The reversal of the Tax Court in *Catalano v. Commissioner*[21] narrows slightly the scope of abandonment with the Ninth Circuit Court decision serving notice that abandonment of property requires a formal notice and hearing[22] with an unenthusiastic response to arguments for broadening the concept of abandonment in other situations involving a type of constructive or implied abandonment.

FOOTNOTES

1 11 U.S.C. § 554. See generally 13 Harl, *Agricultural Law* §120.04[3] (2001); 5 Harl, *Agricultural Law* § 39.04[2][a][v] (2001); Harl, *Agricultural Law Manual* § 13.03[7][b][iv] (2002).

2 *In re* Olson, 930 F.2d 6 (8th Cir. 1991) (abandonment of land to debtor; court offered no theory for holding that deflection approach applied).

3 *In re* Johnston, 49 F.3d 538 (9th Cir. 1995) (court held requirements for abandonment did not include consideration of effect on debtor's "fresh start").

4 Catalano v. Comm'r, 2002-1 U.S. Tax Cas. (CCH) ¶ 50,203 (9th Cir. 2002) (relief from stay granted on residence, residence sold in foreclosure; income tax consequences not same as abandonment).

5 2002-1 U.S. Tax Cas. (CCH) ¶ 50,203 (9th Cir. 2002).

6 Catalano v. Comm'r, T.C. Memo. 2000-82.

7 Id.

8 11 U.S.C. § 554.

9 2002-1 U.S. Tax Cas. (CCH) ¶ 50,203 (9th Cir. 2002).

10 11 U.S.C. § 554.

11 *In re* Johnston, 49 F.3d 538 (9th Cir. 1995).

12 *In re* A.J. Lane & Co., 92-1 U.S. Tax Cas. (CCH) ¶ 50,059 (Bankr. D. Mass. 1991).

13 5 Harl, *Agricultural Law* § 39.04[2][a][v] (2001); Harl, *Agricultural Law Manual* § 13.03[7][b][iv] (2002).

14 2002-1 U.S. Tax Cas. (CCH) ¶ 50,203 (9th Cir. 2002), *rev'g*, T.C. Memo. 2000-82.

15 Ltr. Rul. 8918016, Jan. 31, 1989.

16 I.R.C. § 108(a)(1)(A).

17 See generally 5 Harl, *Agricultural Law* § 39.04[2][a][v] (2001); Harl, *Agricultural Law Manual* § 13.03[7][b][iv] (2002).

18 I.R.C. § 108(a)(1)(B).

19 I.R.C. § 108(g).

20 *Id*.

21 2002-1 U.S. Tax Cas. (CCH) ¶ 50,203 (9th Cir. 2002).

22 11 U.S.C. § 554.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

BANKRUPTCY

CHAPTER 13-*ALM* § 13.03.*

DISPOSABLE INCOME. The debtors' Chapter 13 plan was confirmed and contained a provision that all income tax returns to which the taxpayers became entitled during the plan were to be included in disposable income. The plan ended on April 4, 2001 and the debtors received a discharge on April 24, 2001. The trustee then learned that the debtors received an income tax refund for 2000 taxes and sought to include the refund in the disposable income. The court held that the debtors became entitled to the refund on December 31, 2000; therefore, the refund was included in disposable income under the plan. ***In re* Midkiff, 271 B.R. 383 (Bankr. 10th Cir. 2002)**.

FEDERAL TAX-*ALM* § 13.03[7].*

DISCHARGE. The U.S. Supreme Court has unanimously decided an issue that has spawned numerous reported decisions that have produced a varied response to the issue of whether a

**Agricultural Law Manual* (ALM).

bankruptcy case tolls the three-year period under Section 523 (a)(1)(A) for taxes. The debtors filed their 1992 tax return on October 15, 1993 without paying the taxes. The debtors made a few small payments on the taxes but then filed for Chapter 13 in May 1996. The 1992 taxes were included in the case and the case was voluntarily dismissed in March 1997 on the same day that the debtors filed for a new Chapter 7 case. The debtors argued that the 1992 taxes were dischargeable because they were filed more than three years before the Chapter 7 bankruptcy case. The trial and appellate courts held that the three year period in Section 523(a)(1) was tolled during the Chapter 13 case; therefore, the taxes were nondischargeable. ***In re* Young, 2002-1 U.S. Tax Cas. (CCH) ¶ 50,257 (S. Ct. 2002), *aff'g*, 233 F.3d 56 (1st Cir. 2000)**.

CONTRACTS

MITIGATION. The defendant entered into a contract to deliver cotton produced by the defendant. The defendant failed to deliver the cotton as agreed and the plaintiff was forced to purchase replacement cotton. The plaintiff sued for the difference in price, arguing that the defendant had breached the contract. The defendant argued that the contract was not valid because it did not establish a clear price. The court acknowledged that both parties had differing interpretations of some terms in the contract but held that the contract was clear as to the price. The defendant also argued that the plaintiff failed to promptly attempt to mitigate the damages by buying replacement cotton immediately after the defendant notified the plaintiff that the defendant did not intend to deliver the contract cotton. The defendant claimed to have given oral notice of the breach two months before the replacement cotton was purchased. The court held that the issue of when the breach occurred was one of fact for the jury. The court upheld the jury verdict for damages as supported by sufficient evidence. **Carolyn B. Beasley Cotton Co. v. Ralph, 59 S.W.3d 110 (Tenn. Ct. App. 2000)**.

FEDERAL AGRICULTURAL PROGRAMS

ASIAN LONGHORNED BEETLE. The APHIS has adopted as final regulations amending the Asian longhorned beetle regulations to include additional quarantined areas in Illinois and New York. **67 Fed. Reg. 9285 (Feb. 28, 2002)**.

BLACK STEM RUST. The APHIS has adopted as final regulations amending the black stem rust quarantine and regulations to require that persons who request the addition of Berberis, Mahoberberis, or Mahonia spp. plants to the list of rust-resistant varieties in the regulations must provide APHIS with a description of the variety that can be used by inspectors to clearly identify the variety and distinguish it from others. The regulations also require that inspectors verify, prior to interstate movement, that varieties match their description. The regulations add 32 new varieties to the list of rust-resistant Berberis, Mahoberberis, and Mahonia species. **67 Fed. Reg. 8177 (Feb. 22, 2002)**.

CITRUS CANKER. The APHIS has adopted as final regulations amending the citrus canker regulations by removing a portion of the quarantined area in Manatee County, FL, from the list of quarantined areas. **67 Fed. Reg. 9389 (March 1, 2002)**.

SHARED APPRECIATION AGREEMENTS. The FSA has adopted as final regulations amending the Shared Appreciation Agreement (SAA) and the servicing regulations of SAAs. The SAA ensures that FSA shares in any appreciation of real estate security when a farm borrower has received a writedown of a portion of a FSA debt. The amount due can be paid in full or amortized when the SAA matures or is triggered during the term of the agreement. The final regulation reduces the amortization interest rate on all SAA loans to the Farm Program Homestead Protection rate less 1 percent as of October 28, 2000, the date of enactment of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2001. **67 Fed. Reg. 7942 (Feb. 21, 2002)**.

FEDERAL ESTATE AND GIFT TAX

GENERATION SKIPPING TRANSFERS. The decedent was the beneficiary of a testamentary trust established by the decedent's predeceased spouse. The trust provided for distribution of income and discretionary distribution of corpus. The decedent also had a testamentary power of appointment over the trust corpus remaining at the decedent's death. The decedent exercised that power for a portion of the trust in favor of several grandchildren and left the remainder to pass as directed by the trust. The trial court held that the exercise of the power of appointment removed the pre-1986 trust from the grandfather clause of I.R.C. § 1433(b)(2). The trial court rejected the reasoning of *Simpson v. United States, 183 F.3d 812 (8th Cir. 1999)* that the exercise of the power of appointment was not a substantive modification of the trust. The trial court stated that the grandfather clause purpose would be violated to allow a beneficiary to extend the clause to new generation-skipping transfers resulting from exercise of the power of appointment. The trial court held that its holding complied with the final regulations discussed at 12 *Agric. L. Dig*. 4 (2001). The appellate court reversed, holding that the exercise of the power of appointment did not violate the requirements of the grandfather provisions for pre-1986 trusts. The appellate court followed the reasoning of *Simpson*, *supra*. Note: The final regulations provide that the lapse or exercise of a power of appointment does not affect the eligibility of a pre-1986 trust for the grandfather provision. **Bachler v. United**

States, 2002-1 U.S. Tax Cas. (CCH) ¶ 60,430 (9th Cir. 2002), ***rev'g*****, 2000-2 U.S. Tax Cas. (CCH) ¶ 60,390 (N.D. Calif. 2000)**.

GIFTS. The taxpayer owned timberland and stock in several banks. On August 1, 1991, the taxpayer executed a partnership agreement forming a partnership with the taxpayer's two sons, with each son receiving a 25 percent interest in the partnership and the taxpayer receiving a 50 percent interest. The sons executed the agreement the next day. On August 1, 1991, the taxpayer also transferred the land to the partnership in two deeds for 50 percent of the land each. A month later some of the bank stock was transferred to the partnership. The taxpayer argued that the transfer of the land resulted in two gifts of minority interests (25 percent of each 50 percent interest) in the land to each son, entitling each gift to a minority interest discount. The taxpayer treated the gifts as enhancements of the sons' partnership interests, thus using the 25 percent partnership interests as the guide for valuing the gifts. The court held that the value of the gifts was to be determined by the nature of the property transferred, not the resulting type of ownership through the partnership. The court held that the transfers of land and stock were indirect gifts to the sons and were entitled to a 15 percent discount for an undivided fractional interest in the land transferred. See Harl, "More on Family Limited Partnerships," 12 *Agric. L. Dig*. 1 (2001). **Shepherd v. Comm'r, 2002-1 U.S. Tax Cas. (CCH) ¶ 60,431 (11th Cir. 2002),** ***aff'g*****, 115 T.C. 376 (2000)**.

FEDERAL INCOME TAXATION

BAD DEBTS. The taxpayer was a corporation with two shareholders. One shareholder had the option to purchase all of the other shareholder's stock at a discount. The shareholder had financial difficulties and the corporation decided to try to prevent the options from being held by the shareholder's creditors. The corporation loaned money to the shareholder who agreed not to exercise the options. The loan was nonrecourse and the value of the stock and options was greater than the loan amount. However, the corporation obtained the right to revoke the options if the loan was foreclosed. The shareholder defaulted on the loan and the corporation claimed a bad debt deduction for the difference between the amount owed and the options and stock received in the foreclosure. The court held that a bad debt deduction was not allowed because the transaction was, in substance, a sale of the stock and options because the shareholder had no reason to attempt to repay the loan and the purpose of the transaction was to prevent the shareholder from assigning the options and stock to the shareholder's creditors. **Rogers v. United States, 2002-1 U.S. Tax Cas. (CCH) ¶ 50,240 (10th Cir. 2002),** ***aff'g*****, 58 F. Supp. 2d 1235 (D. Kan. 1999)**.

BUSINESS EXPENSES. The taxpayer was a geography instructor at four junior colleges, all part time positions. The taxpayer reported the income from these jobs on Schedule C as business income and claimed business expenses for 85 percent of the rent of the taxpayer's residence and for two rented storage units. The taxpayer argued that the spaces were used to store a substantial library of geographical materials. The court held that the taxpayer was an employee of the junior colleges and not an independent contractor; therefore, the income was not business income. The court disallowed the rental expense for the home as not incurred for the convenience of the taxpayer's employer and disallowed the storage rent expense as not ordinary and necessary for the taxpayer's business. **Newhouse v. Comm'r, T.C. Summary Op. 2002-18.**

The taxpayer purchased a commercial building with the intent to renovate the building and use it for a restaurant and nightclub. The taxpayer claimed deductions for the renovation costs, interest on the construction loan and depreciation. The court found that the building was not used for profit because the building was used only by nonprofit volunteer groups. The court held that the renovation costs and interest expenses had to be capitalized in the basis of the building. The depreciation deduction was disallowed except for the portion which represented the section of the building which was rented for storage. **Wilson v. Comm'r, T.C. Memo. 2002-61**.

The taxpayer worked as a forester for California. In 1994, the taxpayer purchased 39 acres of burned forest land after conducting studies as to whether the land would support a commercial tree farm operation. During 1995 and 1996, the taxpayer attempted to plant one species of tree on the property but determined that the land would not support the commercial production of these trees. Although the taxpayer continued to improve the property, by 2001 no trees had been planted and the taxpayer still had not decided what trees could be feasibly produced on the land. The taxpayer claimed deductions for the expenses incurred in clearing the land and making improvements, including a road. The court held that, during 1995 and 1996, the taxpayer was not conducting a trade or business and was not entitled to any business deductions for the expenses. In addition, the court held that the expenses were part of the start-up costs to any future business and could not be currently deducted. **McKelvey v. Comm'r, T.C. Memo. 2002-63**.

CORPORATIONS-*ALM* § 7.02.*

ACCOUNTING METHOD. The taxpayers were two medical professional corporations which provided chemotherapy services. The staff physicians examined patients and prescribed the chemotherapy for the patients' conditions. The taxpayers provided pharmacy services for drugs which were not administered at the clinics but were part of the chemotherapy regimen as well as the drugs which were used at the clinic. The IRS argued that the taxpayers were required to maintain inventories of the drugs as merchandise. The court held that the drugs were not merchandise but were part of the medical services offered by the taxpayers; therefore, the taxpayers were not required to use the accrual method of accounting. The appellate court affirmed in a decision designated as not for publication. **Mid-Del Therapeutic Center, Inc. v. Comm'r,**

***Agricultural Law Manual* (ALM).**

2002-1 U.S. Tax Cas. (CCH) ¶ 50,245 (10th Cir. 2002), ***aff'g*****, T.C. Memo. 2000-130**.

CASUALTY LOSS. The taxpayer owned a warehouse which was damaged when excessive snow and ice on the roof and rotted trusses caused the roof to collapse. The taxpayer filed an insurance claim which was pending by the end of the tax year in which the collapse occurred. The insurance company eventually denied the claim. The court held that the taxpayer could not claim a casualty loss for the year of the collapse because the taxpayer still had a reasonable expectation of receiving an insurance payment at the end of the tax year. **Julicher v. Comm'r, T.C. Memo. 2002-55**.

DISCHARGE OF INDEBTEDNESS. The taxpayer had borrowed money from the FmHA (now FSA) for the taxpayer's farming operation and had defaulted on the loans. The FmHA foreclosed against the security for the loans and, in 1990, forgave the remaining indebtedness, giving rise to $32,000 in discharge of indebtedness income. The taxpayer excluded that amount from income under the qualified farm indebtedness exception. The IRS argued that the discharge of indebtedness income was not qualified farm indebtedness because the taxpayer did not have more than 50 percent of income from farming for the three years prior to receiving the discharge of indebtedness income. The taxpayer failed to provide any direct evidence of the taxpayer's farm and nonfarm income; therefore, the court held that the taxpayer was not eligible for the qualified farm indebtedness exception. The appellate court affirmed in a decision designated as not for publication. **Campbell v. Comm'r, 2002-1 U.S. Tax Cas. (CCH) ¶ 50,242 (8th Cir. 2002),** ***aff'g*****, T.C. Memo. 2001-51**.

FARM PROGRAM PAYMENTS. The IRS has announced that landowners, producers and tobacco quota owners who receive money from the National Tobacco Settlement Trust must report those payments as income each year. The payments compensate farmers for lost revenue due to decreased demand for tobacco and, thus, constitute gross income taxable as ordinary income. Farmers in Alabama, Florida, Georgia, Indiana, Kentucky, Maryland, Missouri, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia and West Virginia will receive the payments over a 12-year period that began in 1999. The payment may be reported as income on different tax forms depending on specific taxpayer situations. **IR-2002-28**

INTEREST. The taxpayer lived in a residence purchased by the taxpayer's sister, because the taxpayer could not qualify for the loan. The taxpayer did not make rent payments to the sister but paid all mortgage payments and all maintenance and tax payments. The taxpayer claimed the interest on the mortgage payments as a Schedule A deduction. The court held that the taxpayer was not entitled to the mortgage interest deductions because the taxpayer did not own the property. **Hackley v. Comm'r, T.C. Summary Op. 2002-19**.

INTEREST RATE. The IRS has announced that, for the period April 1, 2002 through June 30, 2002, the interest rate paid on tax overpayments remains at 6 percent (5 percent in the case of a corporation) and for underpayments at 6 percent. The interest rate for underpayments by large corporations is 8 percent. The overpayment rate for the portion of a corporate overpayment exceeding $10,000 is the federal 3.5 percent. **Rev. Rul. 2002-13, I.R.B. 2002-__**.

NET OPERATING LOSSES. The taxpayer claimed net operating losses for three tax years and carried them forward to the fourth year to offset income in that year. The taxpayer provided no evidence to support the claims of net operating losses for the three years except the income tax returns filed for those years. The taxpayer did not make any election to carry the net operating losses forward. The court held that the deduction for the carried-forward losses was disallowed because (1) the tax returns were insufficient substantiation and (2) the losses should have been carried back to previous tax years first and the taxpayer provided no evidence to determine whether the losses were offset by income in those earlier tax years. **Gale v. Comm'r, T.C. Memo. 2002-54**.

PARTNERSHIPS-*ALM* § 7.03.*

CHARITABLE DEDUCTION. The taxpayer was a partnership, organized as an LLC, which acquired a farm from a family corporation which had used the farm for raising and training horses. The corporation had ceased business and neighbors decided to purchase the farm in order to preserve it. The neighbors formed the partnership solely for the purpose of acquiring the farm in order to preserve the rural nature of the land. The partnership transferred a conservation easement to a nonprofit corporation. The easement prevented development of the land. The partners each received a "distribution tract" which remained subject to the conservation easement. The IRS ruled that the conservation easement was a "qualified conservation contribution" under I.R.C. § 170(h) and that each partner was eligible for a charitable deduction for the partners' distributive share of the value of the conservation easement. **Ltr. Rul. 200208019, Nov. 26, 2001**.

PENSION PLANS. For plans beginning in February 2002, the weighted average is 5.70 percent with the permissible range of 5.13 to 5.98 percent (90 to 106 percent permissible range) and 5.13 to 6.27 percent (90 to 110 percent permissible range) for purposes of determining the full funding limitation under I.R.C. § 412(c)(7). **Notice 2002-16, I.R.B. 2002-9, 562**.

The IRS has released a list of entities that have been approved by the Commissioner to serve as a nonbank trustee or custodian for Archer medical savings accounts, custodial accounts of a pension plan qualified under I.R.C. § 401, custodial accounts described in I.R.C. § 403(b)(7), trust or custodial accounts of individual retirement accounts established under I.R.C. §§ 408(a), 408A or 530 and custodial accounts of eligible state deferred compensation plans described in I.R.C. § 457(b). These accounts are tax-exempt if the trustee or custodian is a bank (for Archer MSAs, a bank or insurance company) or an approved nonbank trustee or custodian. **Ann. 2002-12, I.R.B. 2002-8, 533**.

RETURNS. The IRS has announced the release of revised Pub. 969, Medical Savings Accounts; Pub. 3920, Tax Relief for Victims of Terrorist Attacks; and Pub. 1542 (Rev. February 2002), Per Diem Rates (For Travel Within the Continental United States) designed for employers who pay a per diem allowance to employees for business travel away from home on or after October 1, 2001, within the continental United States. These documents are available at no charge (1) by calling the IRS's toll-free telephone number, 1-800-829-3676; (2) via the internet at http://www.irs.gov; (3) through FedWorld; or (4) by directly accessing the Internal Revenue Information Services bulletin board at (703) 321-8020.

TAX SHELTERS. The taxpayer was involved in several successful non-farm businesses and financial operations and invested in a partnership which developed and operated jojoba farms. The taxpayer claimed tax losses more than double the initial investment in the first tax year and additional losses in following years. The losses were disallowed because the partnership was held to be a sham tax shelter. The issues in this case were whether the taxpayer was liable for the negligence component of the accuracy-related penalty and whether the IRS should have waived the understatement of tax component of the accuracy-related penalty. The court ruled that it was unreasonable for the taxpayer to not have sought expert tax advice before claiming substantial and accelerated tax losses more than double the initial investment. The taxpayer also failed to provide any substantial authority for the claim of losses. **Finazzo v. Comm'r, T.C. Memo. 2002-56**.

NEGLIGENCE

RECREATIONAL IMMUNITY. The plaintiff was injured while hunting in a tree stand which collapsed. The tree stand was constructed by the nephew of the property owners. The nephew used the tree stand for hunting and allowed the plaintiff to use the tree stand for hunting. The plaintiff sued the nephew, who was represented by the nephew's insurance company. The defendant claimed that the nephew was immune from liability under Wis. Stat. § 895.52 because the injury occurred on the defendant's property while used for recreational purposes. The major issue was whether the statute could apply to a tree stand located on real property owned by third parties. The court held that "property" under the statute included structures, whether or not the owner of the structure also owned the underlying real property; therefore, the accident was covered by the recreational immunity statute and the defendant was not liable for the plaintiff's injuries. The court noted that the holding was consistent with the purpose of the statute in promoting recreational use of rural property. **Peterson v. Midwest Security Ins. Co., 636 N.W.2d 727 (Wis. 2001), *aff'g*, 617 N.W.2d 876 (Wis. Ct. App. 2000)**.

NUISANCE

HOG FARM. The plaintiffs were rural neighbors of a hog farm operated by the defendant. A jury awarded 52 of the 108 plaintiffs $100,000 each as compensation for the impairment of their use of their properties by the odors and water contamination by the defendant's hog farm. The defendant argued that the award was improper because the plaintiffs failed to prove that the hog farm was a temporary nuisance. The plaintiff argued that the evidence failed to show that the nuisance was abatable. The court noted that the defendant had claimed in pre-construction announcements that the facility would have no odors or effect on the water because the facility would use the latest scientific methods to control odors and waste disposal. The court listed several fairly simple waste control methods which would have easily lessened the odors and discussed other evidence presented by the plaintiffs of waste management technologies available to abate the odors and reduce pollution from the hog facility. Thus, the court held that the plaintiffs had presented substantial evidence of the ability of the defendant to abate the nuisance and that the nuisance was temporary. The defendant also argued that one plaintiff did not own the property on which they lived and could not file a claim for nuisance. The court held that ownership of the property was not a prerequisite to bringing a nuisance claim where the plaintiffs were rightfully occupying the property during the nuisance. **Hanes v. Continental Grain Co., 58 S.W.3d 1 (Mo. Ct. App. 2001)**.

PROPERTY

EASEMENT. The plaintiff and defendant owned neighboring rural properties which were previously part of one farm. Both properties were linked to a road by a gravel one-lane roadway which first passed over a third party's land, then over the defendant's land before splitting into two lanes, one of which led to the defendant's residence and the other to the plaintiff's property. The defendant closed the gravel portion with a gate as a security measure and the plaintiff sued to remove the gate, claiming a right of way over the roadway as (1) a public passway, (2) a prescriptive easement, or (3) quasi-easement by implication. The trial court ruled against the roadway being a public roadway because the roadway was not dedicated by the state or county and the evidence was insufficient as to the amount of public use. The trial court also ruled against a prescriptive easement because the first use of the road by an unrelated party was permissive and a prescriptive easement cannot arise without adverse use of the roadway for 15 years. The trial court also rejected the claim of quasi-easement because the evidence showed that the defendants did not purchase their land with the knowledge of any claim of an easement over their property. The appellate court affirmed. **Cole v. Givin, 59 S.W.3d 468 (Ky. 2001)**.

The plaintiff owned 240 acres of farm land neighboring land owned by the defendant. The defendant's land was formerly a farm but the defendant constructed a golf course and fishing club on the property. The defendant's land had a ditch crossing it which flowed to the plaintiff's property. The defendant negotiated with the plaintiff for use and alteration of the ditch but the parties failed to agree. The defendant then proceeded with alteration of the ditch and disposal of waste water into the ditch. The plaintiff sued for trespass on its easement and asked for restoration of the ditch to its original state. The trial court ruled that the defendant had violated the plaintiff's easement and allowed the defendant to either (1) restore the ditch to its original condition or (2) be responsible for all maintenance of the ditch such that the ditch would provide as much water as it did before the alterations. The defendant chose the second option. The appellate court affirmed the trial court's ruling that the defendant had violated the easement and held that a land owner burdened by a water easement may not alter the waterway without either the downstream owner's consent or a court decree allowing the alteration. The appellate court, however, held that if the plaintiff can prove damage to the plaintiff's use of the easement, the defendant must restore the ditch to its original condition. The court used the Restatement (Third) of Property (Servitudes) test for damages as "(1) significantly lessen the utility of the easement; (2) increase the burdens on the owner of the easement in its use and enjoyment; or (3) frustrate the purpose for which the easement was created." **Roaring Fork Club, L.P. v. St. Jude's Co., 36 P.3d 1229 (Colo. 2001),** ***aff'g in part and rev'g in part*** **, 15 P.3d 281 (Colo. Ct. App. 1999)**.

SECURED TRANSACTIONS

LANDLORD'S LIEN. The defendant cash leased farm land to a tenant. The lease claimed a lien for the defendant in the tenant's crops and proceeds. However, the defendant did not record the lease or lien. The plaintiff bank had a perfected security interest in the tenant's crops and proceeds and claimed a priority security interest in the tenant's crop proceeds. The defendant argued that N.D.C.C. § 47-16-03 created a superpriority in favor of the landlord for unpaid rent in any crops grown on the rented land. The statute referred to a lien for the "rental share of the lessor" and the plaintiff argued that the statutory lien applied only to crop-share leases. The court agreed and held that the defendant did not have a statutory lien for unpaid cash rent. **Security State Bank v. Orvik, 636 N.W.2d 664 (N.D. 2001)**.

STATE REGULATION OF AGRICULTURE

POULTRY. The plaintiff operated a poultry transportation business in several states. The state tested two shipments made by the plaintiff and tested two birds as positive for avian influenza virus. The state then tested the plaintiff's facilities and also found positive samples of the virus. The state ordered the quarantine of all poultry on the plaintiff's premises at the time and required the plaintiff to destroy all the birds and clean the facilities. The plaintiff claimed that the test results occurred because the plaintiff had just vaccinated the birds for the virus. The quarantine was eventually lifted and the plaintiff was reinstated as an approved poultry wholesaler. The plaintiff filed a claim for compensation with the state but the claim was returned for lack of substantiation as to the value of the destroyed birds. The plaintiff sued for compensation, arguing that the inspectors exceeded their discretionary authority by failing to account for the vaccination as a cause of the positive test results. The court held that the state inspectors had made every effort to determine the source of the test results and, in view of the lack of contrary evidence, were justified in ordering the destruction of the birds. The court noted that the only impediment to the plaintiff's full compensation was the plaintiff's own failure to substantiate the value of the birds lost. **Webster v. Moquin, 175 F. Supp.2d 315 (D. Conn. 2001)**.

IN THE NEWS

ECONOMIC STIMULUS BILL. The Job Creation and Worker Assistance Act of 2002 also known as the Economic Stimulus bill was passed by the U.S. House of Representatives and the U.S. Senate and signed into law by the President on March 9.

A major provision is a 30 percent extra depreciation allowance for both regular tax and AMT purposes. The new 30 percent depreciation allowance is for eligible property for which there was no written contract in effect before September 11, 2001, to acquire the property. The original use of the property must begin with the taxpayer (be new property) and be "acquired" by the taxpayer on or after September 11, 2001 and before September 11, 2004 and placed in service before January 1, 2005. Thus, some property on the 2001 return may be eligible. The statute could be read as allowing the 30 percent allowance first, before expense method depreciation or regular depreciation. However, the Blue Book, which has already been published by the Joint Committee on Taxation in electronic form, takes the position in Section 1 that the 30 percent allowance is claimed after expense method depreciation. The basis remaining after expense method depreciation and the 30 percent allowance have been claimed is eligible for regular depreciation. The 30 percent depreciation allowance is available for depreciable property with a recovery period of 20 years or less, computer software, water utility property and qualified leasehold property. Passenger automobiles subject to the depreciation limits may be eligible for up to $4600 of this extra depreciation. The passenger automobile provision increases the limitation under I.R.C. § 280F(a)(1)(A)(i) by $4600 (which is for the first taxable year in the recovery period). **Sec. 101**.

The legislation also extends the two-year net operating loss carryback to five years for net operating losses occurring in any taxable year ending during 2001 or 2002. Remember, farming net operating losses are already eligible for a five year carryback. **Sec. 102. H.R. 3090, Job Creation and Worker Assistance Act of 2002.**

ESTATE TAX. The Congressional Research Service has issued a report on the distribution of assets in taxable estates that filed returns in 1999. The report found that farm assets represented 0.31 percent of the total value of taxable estates that filed tax returns in 1999. **2002 ARD 040-5 (CCH)**.

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Interstate Holiday Inn, Grand Island, NE

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The seminar are held on Tuesday, Wednesday, Thursday, and Friday. Registrants may attend one, two, three or all four days, with separate pricing for each combination. On Tuesday, Dr. Harl will speak about farm and ranch income tax. On Wednesday, Dr. Harl will cover farm and ranch estate planning. On Thursday, Roger McEowen will cover farm and ranch business planning. **NEW THIS YEAR**: On Friday, Roger McEowen will cover agricultural contracts. Your registration fee includes comprehensive annotated seminar materials for the days attended which will be updated just prior to the seminar. The seminar materials will also be available on CD-ROM for a small additional charge. A buffet lunch and break refreshments are also included in the registration fee.

Here are some of the major topics to be covered:

• Income tax aspects of property transfer, including income in respect of decedent, installment sales, private annuities, self-canceling installment notes, and part gift/part sale transactions.

• Taxation of debt, taxation of bankruptcy, the latest on SE tax of rental of land to a family-owned entity; income averaging; earned income credit; commodity futures transactions; paying wages in kind; new depreciation rules.

• Farm estate planning, including 15-year installment payment of federal estate tax, co-ownership discounts, alternate valuation date, special use valuation, family-owned business deduction (FOBD), marital deduction planning, disclaimers, planning to minimize tax over deaths of both spouses, trusts, and generation skipping transfer tax.

• Gifts and federal gift tax, including problems with future interests, handling estate freezes, and "hidden" gifts.

• Organizing the farm business--one entity or two, corporations, general and limited partnerships and limited liability companies.

• Farm contracts. **New this year**. This will be the general topic for all of the Friday session.

Special room discounted rates are available at the hotel for seminar attendees.

The seminar registration fees for current subscribers (and for multiple registrations from one firm) to the *Agricultural Law Digest*, the *Agricultural Law Manual*, or *Principles of Agricultural Law* are $180 (one day), $345 (two days), $500 (three days), and $650 (four days). The registration fees for nonsubscribers are $200, $385, $560 and $720, respectively.

Registration brochures will be mailed in July and registration is available now on our web site at http://www.agrilawpress.com. For more information, call Robert Achenbach at 1-541-302-1958, or e-mail to **robert@agrilawpress.com**